Some research has shown, while as little as 1% of the lawsuits filed each year in the United States actually make it to trial, of those that make it to trial, medical malpractice claims lead the group. Perhaps it’s just a numbers game since one commonly-cited study estimates that between 44,000 and 98,000 people die and another 300,000 are injured each year as a result of medical errors. Once in trial, research shows plaintiffs with medical malpractice claims win approximately 27% of the time, but the median damage award associated with these wins is approximately sixteen times higher than awards in other tort trials. Estimates put the total annual costs of defending healthcare providers at over $500M.

Medical malpractice litigation is unique. Unlike nearly every other litigation type, every trier-of-fact, whether it be a jury, judge, mediator, or arbitrator,
has strong, personal, case-related experiences. In other words, every trier-of-fact has had interaction with doctors and healthcare providers that shape his or her understanding and beliefs about the nature and quality of healthcare services. Furthermore, the cases most likely to make it to trial are those involving significant or permanent injury or death, which magnifies the psychological and emotional impact on the trier of fact.

In light of these complicating factors and the tremendous exposure to defendants in malpractice litigation, this article focuses on two key steps for effectively managing a medical malpractice defense.

**Preparing Defendants To Present As Competent and Caring Healthcare Providers**

Defense witnesses are the case in medical malpractice trials. In many respects, medical malpractice verdicts come down to whether or not jurors like the defendant doctor. In other words, for jurors, the decision about whether or not to award significant damages in a malpractice case boils down to watching the defendant’s testimony and asking themselves whether or not the defendant is the type of healthcare provider they would want providing their care. If the answer is yes, the defendant should fare well. If the answer is no, there is little else the defense can do to prevail at trial.

This is where the fact that every trier-of-fact has had their own personal healthcare experiences matters most. Healthcare provider relationships are about trust. According to one national poll, only 41% of Americans are confident that they could get information about the advantages and disadvantages of different treatment options. Only 37% are confident they could get information about a doctor’s training, certification, and experience. 30% expressed confidence in their ability to get data on the number and success rate of procedures performed at a hospital. Finally, only 20% are confident about obtaining the number of disciplinary actions taken against a doctor or hospital. Put simply, many Americans do not feel that they have access to the necessary information to make informed decisions about their healthcare providers and, even if they did, some research suggests this is not the information such decisions would be based on anyways.

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Instead, most Americans make decisions about their healthcare providers based on gut feelings about the person based on their interactions. In other words, the typical patient meets with a doctor, watches and listens, and makes an internal decision about the doctor’s likeability and trustworthiness. Likeability and trustworthiness, in this sense, are signs of quality. This is why many healthcare institutions have focused so much on communication training over the last decade. Research shows improved communication between doctors and patients can significantly reduce the likelihood of malpractice litigation. In fact, some research suggests poor communication is the main reason many malpractice lawsuits are filed.

Communication skills are equally if not more important in medical malpractice litigation where a doctor or healthcare provider must testify. Jurors make the same types of gut feeling determinations about doctors, but in litigation, the only opportunity for interaction is the testimony. Unfortunately, deposition and trial testimony often present more hurdles to witnesses than opportunities. A 2012 National Institute of Mental Health study found 75% of Americans suffer from communication anxiety associated with public speaking. Other surveys show many Americans rate public speaking as their greatest fear, just ahead of dying in a plane crash and drowning. Studies show communication anxiety leads to perceptions of the speaker as less attractive, less intelligent, and less capable. Other studies show a strong negative association between this anxiety and the overall cognitive performance of the speaker during the communication act. Communication anxiety even leads to physical reactions in the speaker, such as increased blood pressure, heart rate, numbness, shortness of breath, heart palpitations, sweating, stomach distress, and nausea.

Testimony only compounds these problems, bringing its own unique combination of stress, complexity, and communication hurdles. Witnesses can be blinded by self-interest, worried about “screwing up” or “losing the case,” intimidated by appeals to the authority of the judge, distracted by the tactics of opposing counsel, or simply confused by the process or case complexities. There is a large body of research that shows the questioning techniques
deployed in cross-examination can confuse and mislead a witness, ultimately undermining the accuracy of the testimony. These barriers often interact to undermine the credibility of the witness. For example, studies in nonverbal communication have repeatedly shown, when a speaker’s verbal message conflicts with his or her verbal message, the nonverbal message prevails. In other words, a nervous witness who provides “good” substantive answers may still prove detrimental to the case. In my own practice, I’ve seen corporate witnesses whose substantive answers were near perfection, but whose nonverbal performance on the stand erased any benefit brought by the perfect answers. In these situations, jurors who dislike a witness because of his or her nonverbal performance will explain away the “good” answers by arguing he or she is lying, a talking head, or something else.

Conversely, I’ve seen witnesses who “screwed up” on the substance, but came across as very likeable. In these instances, the jurors did not notice or did not care about the “screw ups.” For example, in a medical malpractice case, jurors may let a likable health care provider “off the hook” if the provider comes across as the type of person the jurors would want to receive health care from.

Consequently, deposition and trial testimony preparation are vital components of a successful medical malpractice defense. While judges and juries are strongly influenced by the performances of key witnesses in any litigation type, medical malpractice litigation is unique because the performance of the defendant becomes symbolic of the quality of care provided to the plaintiff. This substantially raises the bar for medical malpractice defendants and highlights the need for effective witness preparation sessions in advance.

Practice should be the primary focus of any witness preparation session. No less than two hours should be devoted to pure practice with focus on both the nonverbal presentation and the substantive issues. For example, rather than telling a witness how to deal with a particular topic, ask him or her questions about the topic while practicing and see how he or she deals with it. The end result will be a significant improvement in the overall quality of your witness’s testimony. In short, practice sessions are critical because they provide witnesses with the tools they need to overcome common testimony hurdles.
and arm witnesses with confidence in their ability to successfully navigate the otherwise cumbersome process.

**De-Selecting High-Risk Jurors During Jury Selection**

Another unique aspect of medical malpractice litigation is the role that jurors’ experiences and attitudes play in the formulation of their opinions about the case. In all of the jury research I’ve conducted over the years in medical malpractice cases, one consistency has stood out the most: there tends to be little to no changed between pre and post-deliberation leanings. In other words, jurors make up their mind about medical malpractice cases quickly and stick with that opinion. From a jury consultant’s perspective, when this happens, it’s a clear sign that the case is mostly about jury selection. This shouldn’t be surprising. Personal experiences exert significant influence on how we make sense of things in our life and, as previously noted, medical malpractice is one of those few areas of litigation where every juror brings case-related personal experience to the table.

Jury selection is a fairly simple and straightforward process that has been clouded in pop psychology, gimmicks, and other fatally-flawed techniques. The name itself is a misnomer since the process is really about de-selection.

Research has overwhelmingly shown that experiences and attitudes are the best predictors of human behavior. Demographics can be useful at times, but demographics are only meaningful to the extent that we assume people of similar demographics have similar experiences and beliefs. Consequently, it is more reliable to set demographics aside and get to the core issues.

The key elements of an effective jury selection strategy are the identification of experiences and attitudes that make a potential juror high-risk and the crafting of voir dire questions that make potential jurors comfortable divulging these experiences and attitudes. Any strategy that departs from these core components is an inefficient use of valuable and limited time and risks empanelling jurors that may be the death knell for your client during deliberations.
Some attorneys express discomfort with questions designed to reveal negative attitudes and experiences in voir dire since these topics might “taint” the jury. For those potential jurors who do not have these negative attitudes or experiences, a few moments in voir dire are not going to suddenly change their mind. And if the potential juror is the type of person who does change his or her mind based on a few random comments during voir dire, he or she is also the type or person who will change his or her mind a few more times over the course of trial. But more important, for those potential jurors who have negative attitudes or experiences, there are two opportunities to discuss them: in voir dire when the attorney can do something about it or in deliberations when it’s out of the attorney’s control. Naturally, most will agree that it’s best for the discussion to take place during voir dire.

Finally, some attorneys prefer to spend voir dire trying to “sell their case” to the potential jurors. This is a terrible strategy for a variety of reasons. First, if an attorney is successful at persuading potential jurors, all he or she has done is flag that potential juror for the other side as a strike candidate. I witness this every time I pick a jury. The opposing counsel gets up, sells his or her themes, and gets some potential jurors nodding along with him or her in agreement. In those moments, the opposing counsel has provided extraordinarily valuable data to me about how to prioritize the peremptory strikes.

The reality is that there is no research that shows jurors are persuaded during voir dire, which makes sense since jurors have no context for the case at this point of the trial. Instead, “selling the case” in voir dire actually detracts from the impact of opening since opening is essentially the second time the jurors will have heard your theory of the case.

The art of jury selection is knowing what experiences and attitudes create risk for your client and crafting voir dire questions that make potential jurors comfortable telling you about these experiences and attitudes. The process really is that simple.

**Concluding Thoughts**

Witness preparation and strategy development for jury selection in medical malpractice cases can be handled in-house or the client and trial team can bring in outside expertise by hiring a jury consultant. Fortunately, witness preparation and jury selection are two low-cost services offered by jury consulting firms. I’ve had clients ask me about the merits of jury research in
medical malpractice cases. While there are some cases that are unique enough to warrant the insights that jury research provides, most do not. I’ve often walked out of medical malpractice mock trials and the end of the day, feeling like I learned what I already knew: that the case is going to be about the defendant’s performance on the stand and about jury selection, not so much about the development of a sophisticated case strategy. I don’t mean to suggest that strategy development is not important, but medical malpractice is one of the unique litigation types where most cases boil down to jury selection and the quality of witnesses.

ABOUT THE AUTHOR

Thomas O’Toole, Ph.D., is President and Consultant at Sound Jury Consulting. He has practiced across the nation for over ten years in nearly every litigation type. He has consulted on matters as small as low exposure medical malpractice and as large as “bet-the-company” MDL class actions and billion dollar environmental claims. He received his Ph.D. in litigation psychology and communication at the University of Kansas. His dissertation focused on the how jurors attribute fault in medical malpractice litigation and he has published extensively on the subject.

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